No. 12-3

IN THE

Supreme Court of the United States

JACKIE HOSANG LAWSON; JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, ET AL.,

Respondents.

On A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS* CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files *Amicus* briefs in cases that raise issues of vital concern to the nation's business community.

More than 96% of U.S. Chamber members are small businesses with 100 employees or fewer. Petitioners and the Government advance an interpretation of the Sarbanes-Oxley Act of 2002 ("SOX") that would subject these small businesses to burdensome and expensive whistleblower litigation, which is directly contrary to Congress's objective of protecting small businesses.

SUMMARY OF ARGUMENT

SOX is an act intended to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. No. 107-204, 116 Stat. 745. The resulting legislation reflects "hard-fought compromises" on the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have filed with the Clerk written blanket consents to the filing of *Amicus* briefs.

best means for effectuating that intent. *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). In particular, Congress determined that SOX's investor-protection goals are best achieved through targeted measures that do not unduly burden small businesses. This judgment is reflected in Congress's careful approach to the reach of SOX's provisions, including the whistleblower provision at issue here. Through careful drafting, which is tailored as appropriate to each different provision, Congress focused SOX's requirements on public companies and entities that provide specified investor-related services to public companies, thereby excluding from SOX millions of small businesses that do not resort to the capital markets for funding and have no connection to public company investors. *See* S. Rep. No. 107-146, at 10, 13 (2002) (explaining that the purpose of SOX is "to restore confidence in the integrity of the public markets"). This desire to protect small businesses is confirmed through clear contemporaneous statements in the congressional record. Consistent with the foregoing objectives, the whistleblower protection in Section 806 of SOX is limited to employees of public companies, sparing small businesses from the expense of defending against such claims.

Petitioners and the Government, however, urge an unreasonably broad interpretation of Section 806 that would ignore Congress's hard-fought compromises by extending whistleblower coverage to employees of small, privately-held businesses, thereby exposing such businesses to significant liability. Pet'rs' Br. 60; Gov't Br. 22, 23, 28. This sweeping interpretation, which would extend SOX to

reach employees of any private company that contracts with a public company, casts a wide net over employees who have no exposure to investor-related activities and thus could not possibly assist in detecting investor fraud. Extending SOX to reach those employees would not advance SOX's investor-protection goals and would be directly contrary to Congress's objective of protecting small businesses from the costs and burdens of SOX coverage. By focusing on SOX's goals of protecting investors in public companies, without any consideration for Congress's other objective of protecting small businesses from excessive regulatory burdens. Petitioners and the Government "extend[] the scope of the statute beyond the point where Congress indicated it would stop." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

Nor is the Administrative Review Board's ("ARB"'s) interpretation of SOX in *Spinner v. David Landau & Associates, LLC*, Case Nos. 10-111, 10-115, 2012 WL 1999677 (ARB May 31, 2012), entitled to *Chevron* or any other deference. First, although the Secretary of Labor ("Secretary") delegated his adjudicative responsibilities under SOX to the ARB, Congress did not grant the Secretary exclusive or even primary authority to construe SOX's whistleblower provision. To the contrary, by allowing *de novo* review of SOX claims in federal court, and denying the Secretary rulemaking authority, Congress clearly signaled that the Secretary's (and hence the ARB's) interpretations of the Act do not carry the force of law. Second, because Congress has clearly limited the reach of Section 806 to employees of public companies, the ARB's contrary interpretation cannot be upheld. Third, even if the ARB's interpretation were entitled

to deference, it should be rejected as unreasonable because it "fail[s] to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)—namely the impact of expansive coverage on small businesses—and is not tied, "even if loosely, to the purposes of the [laws at issue]," *Judulang v. Holder*, 132 S. Ct. 476, 485 (2011).

ARGUMENT

I. EXTENDING SECTION 806 TO EMPLOYEES OF PRIVATELY HELD CONTRACTORS IS CONTRARY TO SOX'S PURPOSES.

Petitioners and the Government advance a sweeping interpretation of Section 806 that would extend those whistleblower provisions to millions of employees of private contractors and subcontractors; they assert that this interpretation is necessary to achieve SOX's investor-protection goals. Pet'rs' Br. 60; Gov't Br. 22, 23, 28. But Congress's purpose in enacting SOX was not to protect investors at any and all costs and regardless of any competing interest; rather, Congress sought to advance investor protection through those targeted measures that do not unduly burden small businesses. The interpretation advanced by Petitioners and the Government is directly contrary to this objective.

A. SOX Seeks to Protect Investors Through Targeted Measures That Do Not Burden Small Businesses.

A purpose-based interpretation of legislation must take into account congressionally-imposed limitations on the means for achieving the legislation's purposes. *Dimension Fin. Corp.*, 474 U.S. at 373-74. A statute's

broad remedial purposes do not justify "extend[ing] the scope of the statute beyond the point where Congress indicated it would stop." *Brown & Williamson*, 529 U.S. at 161.

In *Brown & Williamson*, this Court held that the FDA lacked the power to regulate tobacco, even if such regulation would promote the FDCA's broad public-health goals. The FDA's attempt to regulate tobacco was inconsistent with the FDCA's more specific objectives of ensuring that products regulated by the FDA are "safe" and "effective." Because the FDA conceded that tobacco cannot be made "safe" and "effective" through regulation, the FDA's attempt to regulate tobacco was inconsistent with key statutory objectives. *Id.* at 133, 134, 140, 142. Just so here, SOX's broad investor-protection goal cannot be achieved through an interpretation that disregards SOX's objective of protecting small businesses from new legislative requirements.

SOX's stated purpose—to "protect investors … by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws"—focuses on disclosure obligations that apply exclusively to public companies. Pub. L. No. 107-204, 116 Stat. 745. Not surprisingly, then, SOX's substantive provisions use specific language that limits coverage to public companies and those persons and entities whose work directly affects public company investors. For example, Titles III and IV of SOX, which impose enhanced financial disclosure and other requirements, apply only to public companies. The scope of those titles is governed by their repeated use of terms such as

"issuer"[2] or by referring to companies that are "registered under Section 12" or "file reports under Section 15(d)" of the Securities Exchange Act ("Exchange Act"). *See, e.g.*, 15 U.S.C. § 78j-1 (imposing requirements on audit committee of "each issuer"); 15 U.S.C. § 7241(a) (imposing certification requirements on officers of "each company filing periodic reports under section … 15(a) of the [Exchange Act]" or 15 U.S.C. § 78l); 15 U.S.C. § 78p (imposing disclosure requirements on officers and directors of the issuer of a security "which is registered pursuant to section 12 [of the Exchange Act]"). Other provisions that apply to nonpublic companies do so narrowly by targeting entities that perform public company audits or specified investor-related activities. For example, Titles I and II regulate "public accounting firms that prepare audit reports for issuers, brokers, and dealers." 15 U.S.C. § 7211(c)(1); *see also id.* §§ 7211-7220, 7231-7234. Section 307 of SOX similarly focuses on attorneys "appearing and practicing before the [SEC] in any way in the representation of issuers." *Id.* § 7245. Title V defines codes of conduct for securities analysts who cover public companies. *Id.* § 78o-6. These provisions reflect a measured approach that seeks to restrict coverage to those entities that perform specified investor-related activities and thereby shield other entities from burdensome new legal requirements. *Brown & Williamson*, 529 U.S.

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[2] The term "issuer" is defined as "an issuer (as defined in section 3 of the Securities Exchange Act of 1934 …), the securities of which are registered under section 12 of that Act … or that is required to file reports under section 15(d) …, or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933." 15 U.S.C. § 78j-1.

at 133-34 (determining objectives of a statute by reference to structure and language of statute as a whole).

The legislative history confirms what is apparent from the statutory framework. Senator Sarbanes took special care to clarify that SOX "applies exclusively to public companies—that is, to companies registered with the Securities and Exchange Commission. It is not applicable to the private companies, who make up the vast majority of companies across the country." 148 Cong. Rec. S7351 (daily ed. July 25, 2002). Senator Enzi of Wyoming further noted that Congress had shown restraint by refraining from imposing burdensome new requirements on small businesses. *Id.* at 7354 ("I am pleased to say the actions we took in this bill provide some assurance to small business and small accounting firms that they can continue to operate the way they have in the past.").

When amendments were proposed that would have extended coverage to non-public companies, Senator Dodd of Connecticut rejected those efforts "because … smaller companies just could not possibly afford the costs associated with that." 148 Cong. Rec. S6494 (daily ed. July 9, 2002). Senator Sarbanes further explained:

> when a company becomes public, you then have an investor interest that has to be protected …. That was the universe we tried to deal with in this legislation. We were very careful that the legislation does not apply to most business in America and does not apply to most accountants in America, since most of them don't audit public companies.

Id.

Consistent with SOX's overarching purposes, Section 806 uses the same language that is used throughout the Act to target public companies and exclude smaller, privately held businesses from its scope. Specifically, Section 806, like numerous provisions throughout the Act, targets companies "with a class of securities registered under section 12" or that are "required to file reports under section 15(d)" of the Exchange Act. 18 U.S.C. § 1514A(a). Only employees of those companies are covered, as evidenced in the language and title of Section 806, "Whistleblower Protection for Employees of Publicly Traded Companies." *See* Resp'ts' Br. 13-24. Similarly, repeated references in the legislative history reflect a clear intent to limit coverage to employees of public companies. *Id.* at 30-37. Section 806 accordingly protects only those employees who, as "corporate insiders," are most likely to be in a position to detect the type of fraud that concerns investors. *See* 148 Cong. Rec. S6439 (daily ed. July 9, 2002) (statement of Sen. Patrick Leahy) ("When sophisticated corporations set up complex fraud schemes, corporate insiders are often the only ones who can disclose what happened and why."); *see also* S. Rep. No. 107-146, at 10, 13 (2002) (explaining that the purpose of Section 806 is to provide "protection" for "insiders" of publicly traded companies who often "are the only firsthand witnesses to [a] fraud"). Nothing in the language or legislative history reflects an intention to extend whistleblower coverage from corporate *insiders* to the employees of privately held *outside* service providers or contractors; and such a result would be entirely at odds with SOX's purposes.

B. SOX's Purposes Are Not Served by Extending Whistleblower Protection to Employees of Outside Contractors Who Are in No Position to Detect Investor Fraud.

Employees of most private contractors will not be in a position to detect fraud on public company investors, and thus providing such employees a new private cause of action will not advance the Act's investor protection goals. Private contractors perform an endless range of functions for public companies, most of which have nothing to do with the public company's core business, much less its audit or accounting functions. Indeed, courts and Department of Labor administrative law judges have uniformly noted that expanding coverage to employees of these private contractors is directly in tension with SOX's more limited focus on protecting investors of public companies. *See, e.g.*, *Fleszar v. U.S. Dep't of Labor*, 598 F.3d 912, 915 (7th Cir. 2010) ("Nothing in § 1514A implies that, if the AMA buys a box of rubber bands from Wal-Mart, a company with traded securities, the AMA becomes covered by § 1514A."); *Brady v. Calyon Sec. (USA)*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) ("Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees … of any privately-held employer, such as a local realtor or law firm, that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded company, even as to employees who had no relation whatsoever to the publicly traded company."); *Goodman v. Decisive Analytics Corp.*, No. 2006 SOX 11, 2006 WL 3246820, at *8 (ALJ Jan. 10, 2006) (rejecting an interpretation that would cover any

private company that "engages in any contractual relationship with a publicly traded company").

Petitioners and the Government note that some accountants and lawyers at some private firms do have the ability, by virtue of the services they provide, to detect fraud within public companies, and argue that Section 806 should extend to employees of those entities. Pet'rs' Br. 60; Gov't Br. 22, 23, 28. This narrow focus on a limited set of accountants and lawyers to justify a sweeping expansion of coverage to *all* private contractors is deeply flawed. Petitioners and the Government read the statute as covering the employees of all contractors and subcontractors, and they refuse to acknowledge any limiting principles that would require protected activity to relate to fraud within public companies. Thus, Petitioners and the Government allow for the possibility that an employee of a private contractor or subcontractor would be covered, even if his complaint concerns matters entirely internal to his own company that are unrelated to public company activities or investor concerns. Such a broad interpretation is completely untethered to any identifiable statutory purposes and should therefore be rejected.

C. SOX's Objective of Protecting Small Business Would Be Undermined by Subjecting Private Contractors to a New Form of Civil Liability.

The expansive interpretation advanced by Petitioners and the Government would expose thousands of small, privately held companies to costly litigation, which directly undermines SOX's objective of protecting small business from burdensome new requirements. Small, private contractors have limited revenue, too much of which

is already allocated to defending employment-related litigation. Employment-related litigation is one of the most numerous types of litigation for companies of all sizes,[3] and whistleblower claims are on the rise. In 2012, twenty-six percent of companies were subject to whistleblower allegations, up from 22% in 2011.[4] According to the Occupational Safety and Health Administration's ("OSHA"'s) own statistics, since 2008, employees filed more than 1,100 SOX whistleblower cases with OSHA, and the number of claims filed in 2012 increased by approximately 14% from 2011.[5]

The Government contends that expanding Section 806 to millions of employees of private contractors and subcontractors to public companies covered by SOX is nonetheless warranted because the statute "contains built-in limitations." Gov't Br. 23. But the only limitation acknowledged by the Government is SOX's requirement that employees prove that they were "retaliated against because they reported fraud." *Id.* Although this requirement may provide employers with an ultimate defense to whistleblower litigation, it does not protect them from incurring the expense of defending against otherwise meritless claims.

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[3] *See* Fulbright & Jaworski L.L.P., Fulbright's 9th Annual Litigation Trends Survey Report 10 (2013), http:// www.fulbright.com/images/publications/201302269thAnnualLitTrends.pdf.

[4] *See id.* at 32.

[5] *See* OSHA's Whistleblower Investigation Data: FY2005-FY2013 Q3 (2013) 1, http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf.

Defending whistleblower cases, particularly in the complex area of securities law, is expensive and time consuming. The expense involved is compounded by recent ARB decisions that create barriers to early dismissal of even non-meritorious claims. For example, the ARB has adopted relaxed pleading standards for SOX whistleblower cases, reasoning that because SOX claims involve "inherently factual issues such as 'reasonable belief' and issues of 'motive,'" they "are rarely suited for Rule 12 dismissals." *Sylvester v. Parexel Int'l*, No. 07-123, 2011 WL 2165854, at *10 (ARB May 25, 2011) (noting that "Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules"). Further, the ARB has held that an employee's SOX whistleblower claim need only provide "fair notice" to the employer of the charges against it, *Evans v. EPA*, No. 08-059, 2012 WL 3164358, at *6 (ARB July 31, 2012), and need not be "facially plausible," as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see Sylvester*, 2011 WL 2165854, at *10; *Evans*, 2012 WL 3164358, at *4-6. Under such lenient administrative pleading standards, even non-meritorious cases must often be defended past any initial motion challenging the sufficiency of the pleading and through discovery, a particularly burdensome endeavor for small, privately held companies.

SOX's "reasonable belief" requirement, as interpreted by the ARB and the courts, imposes further impediments to early dismissal. The concept of "reasonable belief" includes both an objective and

subjective component. The objective component "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Johnson v. The Wellpoint Cos.*, No, 11-035, 2013 WL 1182309, at *9 (ARB Feb. 25, 2013) (citations and internal quotations marks omitted). Relying on the reasonable belief requirement, some courts addressing public company employees have held that a whistleblower need not have an accounting background or any training on securities fraud; for these courts, the need to examine an employee's actual training and background is often an impediment to dismissal of a case based on a pleadings challenge or by summary judgment. *See e.g.*, *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376-78 (N.D. Ga. 2004) (denying summary judgment on director of marketing's complaints about overpayments to advertising agency, improper break-down of marketing costs, and suspected kickbacks on lumber purchases); *Mahony v. Keyspan Corp.*, No. 04 CV 554 SJ, 2007 WL 805813, at *1-6 (E.D.N.Y. Mar. 12, 2007) (denying summary judgment where strategic planning director with "neither personal knowledge of the fraud nor the educational background to discover the fraud on his own" could reasonably believe that improperly reported "post-employment benefits" and severance payments constituted shareholder fraud); *Sequiera v. KB Home*, 716 F. Supp. 2d 539, 551-52 (S.D. Tex. 2009) (denying summary judgment where marketing manager without "any formalized training in accounting or Sarbanes-Oxley compliance," could have reasonable belief of shareholder fraud based on company's acceptance of false vendor invoices,

improper transfer of inventory, and direction for him to destroy budget data). Applying this broad interpretation, the ARB has found that "the issue of 'objective reasonableness' involves factual issues and cannot be decided in the absence of an adjudicatory hearing." *Sylvester*, 2011 WL 2165854, at *12.

The subjective reasonableness determination poses similar challenges to pre-hearing dismissal. "To satisfy subjective reasonableness, the employee must actually have possessed the belief that the conduct he complained of constituted a violation of relevant law." *Johnson*, 2013 WL 1182309, at *9 (citations and quotations omitted). But as the ARB has interpreted this requirement, because the employee need not convey reasonableness of their belief to management or other authorities, *Sylvester*, 2011 WL 2165854, at *12; *Johnson*, 2013 WL 1182309, at *9, the subjective component of the reasonable belief standard must be fully investigated and may turn on the credibility of the employee, often rendering it unsuitable for summary adjudication.

Moreover, the ARB's recent decisions have opened the floodgates to a broad range of claims by construing the "protected activity" requirement broadly. The ARB has held that an employee need not describe an actual violation of the law to obtain whistleblower status. *Sylvester*, 2011 WL 2165854, at *12-13. Further, an employee need not show that allegedly protected activities "have a sufficiently definitive and specific relationship to any of the listed categories of fraud or securities violations"; instead, he need only show that he reported conduct that he reasonably believed to be related to one of the enumerated violations. *Id.* at *14-15. Moreover, the

ARB has held that shareholder or investor fraud is not required to establish SOX-protected activity. *Sylvester*, 2011 WL 2165854, at *15. These decisions open the door to extended litigation over employee concerns that are entirely unrelated to the investor-protection purposes of the Act. Such a result, which is to some extent inevitable in any anti-retaliation regime that protects an employee's "reasonable belief," demonstrates why Congress was careful not to burden private companies with litigation against their own employees under Section 806.

II. THE ARB'S DECISION IN *SPINNER* IS NOT ENTITLED TO DEFERENCE

A. Congress Did Not Grant Exclusive or Even Primary Interpretive Authority to the Secretary.

The language and structure of SOX make clear that Congress did not intend ARB decisions to receive deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990). "[A] very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorization[] to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Although Congress authorized the Secretary to conduct adjudications, no "plausible case can be made that Congress would want such a delegation to mean that [the agency] enjoy[s] primary interpretational

authority." *Id.* at 229 n.11 (citation and quotations omitted). Indeed, Congress imparted upon federal district courts original jurisdiction over private actions brought pursuant to Section 806, specifically authorizing *de novo* review of those claims. 18 U.S.C. § 1514A(b)(1)(B). Where Congress provides litigants with "direct recourse to federal court where their rights under the statute are violated," the agency's interpretation of the scope of statutory enforcement provisions is not entitled to deference. *Adams Fruit Co.*, 494 U.S. at 650.

In *Adams Fruit Co.*, the Court refused to defer to the Department of Labor's interpretation of "the scope of judicial power" vested by the Migrant and Seasonal Agricultural Worker Protection Act ("MWPA") because the MWPA provides aggrieved farm workers with direct recourse to federal court for violations of the act. Through the MWPA, Congress authorized the Secretary to promulgate standards implementing the act, but adjudicative authority—and thus authority to interpret the statute's enforcement provisions—rested exclusively in the federal courts. *See id.* Because only those agency determinations that fall within the scope of its interpretive authority are entitled to deference, the Department of Labor's interpretation of the MWPA was not so entitled. *Id.*

Here, as in *Adams Fruit Co.*, Congress granted the federal courts the independent authority to hear *de novo* actions filed under Section 806,[6] thereby vesting

[6] Because a complaining employee may seek review of his claims where "the Secretary has not issued a final decision within 180 days of the filing of the complaint," 18 U.S.C. § 1514A(b)(1)(B), a complainant may file suit in the district court before OSHA has completed its investigation.

the courts with power to interpret Section 806's enforcement provisions. The fact that the ARB shares adjudicative authority with the federal district courts is of no moment,[7] because, as Respondents note (Br. 52) the agency adjudicative process is usually not mandatory. Under Section 806, the ability to seek review in federal court is conditioned on the passage of time rather than the issuance of a final decision, and may occur even prior to the issuance of any decision at all. Because federal courts retain primary interpretive authority, deference to the ARB's interpretation of Section 806 is not warranted.

Unlike in *Adams Fruit Co.*, the administrative body here—the ARB—has no rulemaking authority, further militating against a grant of deference. "[A]gency adjudication is a generally permissible mode of law-making and policymaking only because the unitary agencies," have also "been delegated the power to make law and policy through rulemaking." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 154 (1991). Unlike the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission, the ARB has not been granted rulemaking power. Because Congress elected not to confer upon the ARB any rulemaking authority, its interpretations of SOX through

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[7] By analogy, where interpretive authority is split among two or more agencies, deference to a single agency's statutory interpretation is unwarranted. *See, e.g.*, *DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 487 (D.C. Cir. 2013) ("Justifications for [*Chevron*] deference begin to fall when an agency interprets a statute administered by multiple agencies.").

adjudication are not entitled to deference. *Id.* ("Insofar as Congress did not invest the [agency] with the power to make law or policy by other means, we cannot infer that Congress expected the [agency] to use its adjudicatory power to play a policymaking role.").

B. The ARB's Interpretation Is Contrary to SOX.

The ARB's decision is not entitled to deference for the separate and independent reason that it is inconsistent with the text of SOX. Under *Chevron*, where Congress has clearly addressed the interpretive question at issue, the courts must reject a contrary agency interpretation. 467 U.S. at 843; *see I.N.S. v. Cardoza-Foncesca*, 480 U.S. 421, 448-450 (1987)(applying *Chevron* to agency adjudication).

Instructive here is *FDA v. Brown & Williamson Tobacco Corp.*, where this Court held that a statute's specific objectives of ensuring a product is "safe" and "effective" precluded an interpretation by the FDA that was based on the statute's broad remedial goals. In *Brown & Williamson*, this Court held that the FDA lacked the power to regulate tobacco, even if such regulation would promote the FDCA's broad public-health goals. The FDA's attempt to regulate tobacco was inconsistent with the FDCA's more specific objectives of ensuring that FDA-regulated products are "safe" and "effective." Because the FDA conceded that tobacco cannot be made "safe" and "effective" through regulation, the FDA's attempt to regulate tobacco was inconsistent with key statutory objectives. Finding clear congressional intent to exclude tobacco products from the FDA's jurisdiction, this Court rejected FDA's assertion to the contrary.

Likewise here, Congress's objective of excluding small, privately owned businesses from SOX coverage pervades the text, structure and legislative history of the Act. Because Congress has clearly spoken on the scope of Section 806's coverage, the ARB's contrary interpretation should be set aside.

C. The ARB's Interpretation Is Unreasonable.

Even if the term "employee" in Section 806 is ambiguous, a point *Amicus* does not concede, the ARB's interpretation is not entitled to *Chevron* deference because the ARB has failed to advance a reasonable explanation for its interpretation. *Chevron*, 467 U.S. at 845 ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care . . . we should not disturb it.") (citation omitted).

> [A]n agency [policy decision is] arbitrary and capricious if the agency … entirely failed to consider an important aspect of the problem, … or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc., 463 U.S. at 43; *see also Judulang v. Holder*, 132 S.Ct. 476, 484 n.7 (2011) (noting that "under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance'"); *Nat'l Ass'n of Regulatory Utility Com'rs v. ICC*, 41 F. 3d 721, 726 (D.C. Cir. 1994) ("[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task under the Administrative Procedure Act (APA) ... in determining whether agency action is arbitrary and capricious (unreasonable)."). Even where an agency has "legitimate reasons" for its action, it must act in

"some rational way" and the action "must be tied, even if loosely, to the purposes of the [laws at issue]." *Judulang*, 132 S. Ct. at 485.

Here, the ARB's interpretation of Section 806 completely overshoots the Act's purposes by extending coverage to millions of small businesses whose employees could not possibly advance SOX's investor-protection goals. *See* discussion *supra* 9-10. This sweeping interpretation is not "tied, even loosely" to the Act's investor-protection goals. *Id.* And the ARB's interpretation completely disregards Congress's objectives of protecting small businesses from coverage. The ARB acknowledges Congress's desire to "assuage the concerns of small private companies worried about the burden of SOX's regulatory regime," but concludes that these concerns apply only to SOX's "comprehensive accounting requirements" and not to its whistleblower provision. *Spinner*, 2012 WL 1999677, at *9 (ARB May 31, 2012). This blithe conclusion ignores an important Congressional objective that pervades the entire Act. As discussed *supra* 5-6, Congress's concerns for small businesses are reflected not only in SOX's accounting provisions, but also in Congress's drafting approach to each and every provision of the Act. This careful and pervasive drafting approach, when taken together with references in the congressional record, makes it entirely unreasonable to assume, as the ARB does, that Congress's concerns for small businesses extend only to the Act's "accounting requirements." *Id.* By refusing to consider all of SOX's purposes, the ARB fails to reach "a reasonable accommodation of conflicting policies that were committed to the agency's care" and thus fails the *Chevron* deference test. *Chevron*, 467 U.S. at 845;

Nat'l Ass'n of Regulatory Utility Com'rs, 41 F. 3d at 728 (finding that agency acted unreasonably in favoring one objective of a statute in a way that undermined another objective "whether one considers the case as one involving a question of *Chevron* Step II statutory interpretation or a garden variety arbitrary and capricious review or, as we do, a case that overlaps both administrative law concepts").

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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